

Book Review

The Transformation of Criminal Justice: Comparing France with England and Wales; Les transformations de la justice pénale: une comparaison franco-anglaise, by Renaud Colson and Stewart Field, (Paris: L’Harmattan, Bibliothèques de droit, 2011), 189pp., paperback, €18, ISBN: 978-2-296-56154-0.

This book opens with forewords by two of the most exceptional contemporary legal minds in the English and French legal systems: Lord Phillips of Worth Matravers, the first president of the UK Supreme Court, and Robert Badinter, former president of the *Conseil constitutionnel*, eminent scholar and politician known for his tireless contributions on criminal justice and human rights issues. Lord Phillips finds that “this is an erudite comparative study of recent reforms to the English and French criminal justice systems”, which shows how “reforms have brought the two systems closer together”, thus being “of interest to those who have been brought up to consider the two systems as dissimilar as chalk and cheese” (p.7). This is echoed by Badinter, who considers this book a “brilliant demonstration” of comparative law’s pertinence to jurists—legal scholars, practitioners as well as the legislator—who can find in it

“a particularly rich source of reflection, encouraging them to take a new look at the legal system within which they are evolving, sometimes even leading them to rethink some of its elements”(p.11)

Badinter evidently finds the book a source of reflection himself, as he concludes his foreword by noting that, in the light of the “talented” comparative study by Colson and Field, “the reform of French criminal procedure now appears to be more unavoidable than ever before” (p.13).

The views of this book reviewer perfectly mirror the comments of these most distinguished jurists. Colson’s and Field’s work is an excellent illustration of a fruitful transnational dialogue between two criminal justice scholars who demonstrate a deep understanding not only of their own legal system but also of the foreign legal system that is their comparative point of reference, and who clearly perceive that “their” criminal justice systems do not evolve in a vacuum, but as a result of a tangled web of conflicting influences manifesting themselves at multiple levels (national, transnational and international law influences). By undertaking such dialogue, the authors offer national law experts in both countries a priceless opportunity to see how developments in their legal systems can no longer be seen as purely local phenomena, and how different legal systems are increasingly faced with similar problems to which they increasingly offer similar solutions, irrespective of whether they belong to the common law or civil law traditions. The authors’ declared objectives were to undertake a comparison that would help them search for a more refined understanding of their own legal systems and contribute to contemporary debates about rapprochement and transformation in national law (p.19). They achieve these objectives to a considerable degree.

Interestingly, the book is just over 70 pages long, perhaps resembling a long US law review-style. Brevity is both a strength and a weakness. On the one hand, it results in various topics being examined in a cursory manner. For example, some of the legislative reforms that form the backbone of the authors' analysis are not discussed in detail. References to the institutional, political and cultural backgrounds against which such reforms have materialised merited further attention as well. Then again, avoiding the often excruciating—for the national law expert at least—analysis of each and every aspect of legislative reform in foreign legal systems automatically makes this book a much more accessible resource of comparative law. From this point of view, in addition to stimulating scholarly reflection, the book will have much appeal to criminal justice practitioners and will be useful reading for students (especially postgraduate) in law schools in both English speaking and francophone parts of the world; the book is “happily available in both languages” anyway, a quality that Lord Phillips underlines in his foreword (p.9). It is important to add that it is not just greater accessibility that the authors have achieved in this way; the book is also a tool of legal translation indispensable to students and scholars engaged with the comparison of rules, institutions and practices central to the English and French criminal justice systems as well as the common law and civil law traditions more generally.

The many qualities of the book from a methodological and practical point of view are matched by the sophistication of its thesis. The authors start their analysis by taking stock of rapid criminal justice transformations in common law and civil law systems, as a result of

“influences as diverse as international and European human rights law, the growth of ‘penal populism’ in public debate and the development of new managerial models for the administration of criminal justice”(p.18)

They then argue that the English and French criminal justice systems have been particularly exposed to these influences, and they identify three major transformations caused by them: (a) the introduction of significant procedural guarantees, which they link with the growing emphasis on procedural fairness; (b) the rise of crime control policies, which they see as the response to politically generated anxieties about security and effective deterrence; and (c) other procedural consequences affecting the nature and orientation of the criminal justice system, which they consider side effects of the political project of the modernisation of legal institutions. The book is divided into three parts that reflect these themes. Each part is divided into two chapters, following a cause-and-effect dichotomous pattern, in accordance with the omnipresent (in France) *plan cartésien*; Ch.1 in each part explores influences, then Ch.2 focuses on transformations. In this way, the logic of the argument is particularly easy to follow.

More precisely, in Ch.1 (of Pt I) the authors take as their starting point the increasing emphasis on procedural fairness on both sides of the Channel. This phenomenon is traced to the incessant influence of *international* legal instruments—notably the authority of the European Convention on Human Rights (ECHR)—on the one hand, and to autonomous due process orientated *national* trends on the other. A potential problem with this distinction is that it may be seen as suggesting that national trends are created in isolation from international law

influences, which goes in the opposite direction of the overall argument that the authors are making in this book. A more significant criticism relates to the fact that international influences are presented merely as having been *in synergy* with autonomous national trends in reinforcing the centrality of procedural fairness, which may cause the reader to lose sight of situations where crime control orientated national trends have been *in conflict* with due process orientated international influences. In relation to Strasbourg's influence more particularly, perhaps more attention could have been paid to situations where the court's internationalism has been met with local resistance, a theme which has recently obtained much prominence in both the United Kingdom and France, for example in the context of the debate on prisoners' rights, hearsay and the right to custodial legal assistance. In Ch.2, the authors explore the effect of the influences and trends previously described, accurately pinpointing new procedural rights and institutional transformations triggered by them. Of particular interest here is the observation that the recognition of new procedural rights has led to qualifications of the traditionally inquisitorial and adversarial character of French and English criminal process respectively. This can offer an insight into one of the main theses of the book, the coming together of the English and French criminal process as a result of recent reforms. Perhaps this rapprochement is possible because the English and French criminal justice systems have started to qualify some of the antithetical procedural principles (adversarial and inquisitorial) they had traditionally adopted, endorsing instead the ECHR inspired model that can reach across the common law and civil law traditions, as a result of the common human rights standards that underpin this model (see generally J. Jackson, "Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries" in J. Jackson, M. Langer and P. Tillers, *Crime, Procedure and Evidence in a Comparative and International Context — Essays in Honour of Professor Mirjan Damaška* (Oxford: Hart Publishing, 2008), p.221).

In Pt II, the authors portray crime control as the second source of modern transformations of English and French criminal justice, placing emphasis on the transition from "humanist" to more "repressive approaches to the development of criminal policy" dominating reform circles on both sides of the Channel (p.50). Here the authors describe how Margaret Thatcher's law and order policy ran in parallel with the adoption of a "tough on crime" policy by the political right in France—as a result, in both cases, of growing feelings of insecurity fed by the mass media. Subsequently, in the 1990s, the Labour Party under Tony Blair and the French Socialist Party enthusiastically took up the (police) baton of crime control, mindful of the risk of "losing the battle for public opinion on the terrain of security" (p.51). The authors then illustrate how all this led to the rise of penal populism and a "legislative hyperinflation" that helped the state expand its procedural arsenal, notably through the reinforcement of police powers and the introduction of increasingly simplified procedures and negotiated outcomes. The analysis leads to incisive questions, for example about how the reinforcement of police powers was accommodated by the adversarial principle in England and Wales, or about the logic of the injection of negotiated justice into the inquisitorially rooted system of France. The reader once again has the chance to reflect on the relevance of the adversarial and inquisitorial principles for modern criminal justice

reform in common law and civil law systems, which is a valuable contribution to current debates. In general, Pt II offers a useful review of crime control policies leading to radical transformations of criminal justice in France and England and Wales.

In the final chapter, the authors turn their attention to the political project of state modernisation. Here one may observe with interest how state modernisation has manifested itself in different ways in the United Kingdom and France, especially from the point of view of those driving the project forward. In the United Kingdom it was “the neo-liberal wing of the Conservative Party” that pushed for reform, conceiving modernisation as “something aimed at Whitehall and [the] state bureaucracy” (p.67), whereas in France it was the administrative elites themselves who acted as the driving force, after close consultation with the courts and the legal profession (p.68). Despite these significant differences, state modernisation meant pretty much the same thing in both the United Kingdom and France; the injection of a managerial logic of cost optimisation and consumer satisfaction, leading to “the quantification of criminal justice performance” and “a culture of results” (p.71). Now, this new managerial ethic has had important consequences for English and French criminal procedure (the cause and effect dyad that pervades the book is present here as well). For example, the need for criminal justice institutions to satisfy their customers (“consumerism”) has put the accent on openness and accessibility of legal institutions, and, more specifically, the improvement of the position of the victim in the criminal process, leading to reforms of the law of evidence and procedure, such as “vulnerable witnesses” and “hearsay” reforms in England and Wales (p.75) or the introduction in France of a judge with the specific mission to look after the rights of victims (*le juge délégué aux victimes*) (p.76). A focus on “efficiency” is the second illustration the authors give of managerialism’s impact on the criminal justice system. Their analysis concentrates on how “the search for efficiency can lead to a coming together of the [French and English] legal traditions” (p.80); the efficiency drive simultaneously pushes France and England and Wales away from traditional inquisitorial and adversarial assumptions respectively. The increasing powers of Crown Prosecutors in England and Wales and the introduction of a process of guilty-plea in France are given as characteristic examples. These are useful observations of movements within the English and French legal systems away from criminal justice principles inherent to them.

In their conclusions, the authors explain that it is as a result of such simultaneous movements that systematic differences in English and French criminal justice are beginning to lose their explanatory force, though they rightly qualify this observation by noting that convergence is not happening in the sense of these legal systems becoming indistinguishable, and that English and French criminal procedures are likely to retain important differences (pp.84–85). In the light of these conclusions, one might be tempted to argue that by insistently looking for convergence across traditionally dissimilar systems, there is always the risk of losing sight of the forest for the trees; by placing the emphasis on the rapprochement of specific rules and institutions, one might easily ignore systemic divergence. However, as the authors’ qualifications to the identified rapprochement clearly demonstrate, this is a risk that these authors have skilfully avoided. Even more

intriguing is the concluding observation that these modern transformations of English and French criminal justice are driven by a variety of contradictory factors—for example the pursuit of *procedural fairness* that is diametrically opposed to *crime control* and *managerialism*—hence the difficulty in interpreting the transformations caused by these factors. Here the authors’ attempted interpretation will stimulate thought among comparative criminal justice scholars; “the management of fear and uncertainty” and “the neutralisation of risk” are located as the common denominators of the transformations observed. “Anxiety” and “social distrust”, as prominent characteristics of modern French and British societies, underpin these prima facie contradictory transformational forces, which are thus brought together in a coherent ideological framework (p.86). Equally intriguing is the authors’ observation that these simultaneous transformations of criminal justice signal “a changing relationship with tradition” (p.83). The authors note that the “contemporary world rejects continuity” and that “the role of the past in law is changing” and, in the words of Greek-French philosopher Cornelius Castoriadis, describe modern shifts of criminal justice policy in England and France as a “neutralisation of the past” (p.84), offering a useful contrast to analyses of legal nationalism, isolationism and local resistance as conservative forces shaping law reform (themes developed in D. Giannouloupoulos, “Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance” (2013) 24(3) *Criminal Law Forum* 291).

All in all, this is a well-researched and accessibly written book that will strongly appeal to comparative criminal justice experts on both sides of the Channel. Notwithstanding its short length, the book makes insightful contributions to debates on the convergence of the common law and civil law systems and the role of legal tradition, and opens up new possibilities for criminal justice reform.

D. Giannouloupoulos*
Brunel Law School

* I am very grateful to Paul Roberts for his comments on an earlier draft.